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COURT OF CRIMINAL APPEALS  
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DEANA WILLIAMSON, CLERK

August 16, 2018

Deana Williamson, Clerk of the Court  
Court of Criminal Appeals  
P.O. Box 12308  
Capital Station  
Austin, Texas 78711

**RE: *Keithrick Thomas v. State of Texas*, No. PD-0790-17**

Dear Ms. Williamson:

Please file this post-submission supplemental letter of authority in the above-styled and numbered petition for discretionary review that was argued on May 16, 2018.

On August 16, 2018, in its published opinion in *Young v. State*, \_\_\_ S.W.3d \_\_\_, *slip op.* at 1, No. 01-17-00039-CR, a unanimous panel of the First Court of Appeals concluded that “a police officer violated ... Young’s constitutional rights by removing a pill bottle from [his] pants pocket, when he was neither under arrest nor the subject of a search warrant.” In so holding, the panel rejected the State’s contention that no Fourth Amendment violation occurred “because it was immediately apparent to the officer based on plain feel’ that the pill bottle was contraband.” *Id.* at 2. As recounted below, *Young* provides yet an additional reason why the Court should sustain his ground for review and reverse the decision of the Fourteenth Court of Appeals.<sup>1</sup>

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<sup>1</sup> Mr. Thomas concedes that *Young* is not binding on the Court and that, in all likelihood, the State will seek discretionary review of the court of appeals’s decision. But the reasoning and analysis in *Young* relies on authority from this Court and the Supreme Court that is not subject to reversal and is, accordingly, binding on the Court.

Like Mr. Thomas, Young was a passenger in a vehicle stopped for a traffic violation in the evening in an area known for crime and narcotics activity. *Id.* Like Mr. Thomas, Young exited the vehicle but was ordered to get back in the vehicle by officers.<sup>2</sup> *Id.* Back inside the vehicle, Young, like Mr. Thomas, Young made furtive movements.<sup>3</sup> As in Mr. Thomas's case, no drugs or drug paraphernalia were visible inside the vehicle. *Id.* Once Young was outside the vehicle, he "appeared nervous."<sup>4</sup> Just like the officer in Mr. Thomas's case who handcuffed him as a matter of safety, the officer patted Young down to see if he was armed. *Id.* The officer felt a bulge in Young's left pants pocket he felt might be a weapon, "grabbed it, shook it real quick, and it felt exactly like a pill bottle..." *Id.* at 3. When the officer asked Young what it was, he did not answer. *Id.*

Unlike the level of certainty expressed by the officer in Mr. Thomas's case, the officer in Young testified that based on his experience, a pill bottle "absolutely" may contain narcotics.<sup>5</sup> *Id.* He believed the pill bottle contained narcotics based on "the high-crime area, the time of night [and] the defendant's actions." *Id.* After removing the pill bottle, the officer saw an "orange prescription pill bottle" with an "extremely worn" label that did not identify a patient's name.<sup>6</sup> As, in this case the officer then opened the pill bottle and found narcotics. *Id.*

Tellingly, in holding that the plain feel doctrine did not justify the

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<sup>2</sup> The only meaningful distinction between this case and Young is that Mr. Thomas sought to walk away from officers before complying with their request to stop.

<sup>3</sup> Young's furtive movements were directed at the vehicle's center console. *Id.*

<sup>4</sup> In this case, by contrast, there was no evidence Mr. Thomas appeared nervous when he was confronted by Officer Gemmill. (RR 26-28).

<sup>5</sup> Indeed, in Mr. Thomas's case, Officer Gemmill was nowhere near as sure as the officer in *Young*, testifying that, based on her experience, "oftentimes people, *I guess*, carry their narcotics within pill bottles." (RR 28)(emphasis added).

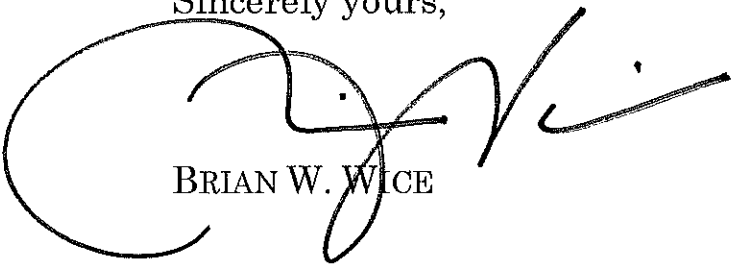
<sup>6</sup> As Mr. Thomas noted in his reply brief and at argument, the trial court's findings of fact describing the pill bottle as a "prescription bottle" are unsupported by the record and not entitled to deference. Mr. Thomas concedes that the Officer Gemmill saw the top of an "orange pill bottle."

officer's removal of the pill bottle, the court of appeals cited and relied on two of the very decisions from this Court that Mr. Thomas cited and relied on in his reply brief, neither of which the State has yet to cite, let alone distinguish.<sup>7</sup> The court of appeals concluded, based upon these cases, and authority it cited and relied on from other States,<sup>8</sup> that it "cannot conclude that an officer's training and experience would supply a reasonable belief, based solely on touch, that a pill bottle – a commonly and typically benign object – is contraband." *Id.* at 11. If this language seems familiar, it is for good reason – it is the identical argument (substituting the word "view" for "touch") that Mr. Thomas advanced in his reply brief and argument.

For the reasons recounted in his reply brief and at oral argument, the self-same "discernible gap" between the reasonable suspicion that may have existed when Mr. Thomas was first confronted by Officer Gemmill and the proof necessary to establish probable cause that the Court has recently spoken of in finding a warrantless search unconstitutional,<sup>9</sup> and that the court of appeals relied on in *Young* to reverse the conviction, *id.* at 13, compels an identical result in this case.

Pursuant to TEX.R.APP.P. 9.5(d), I have served opposing counsel, Clint Morgan and Stacey Soule with a copy of this document via e-filing. Excluding its exempted portions, this document contains 951 words.

Sincerely yours,



BRIAN W. WICE

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<sup>7</sup> *Id.* at 9, citing *Sullivan v. State*, 626 S.W.2d 58, 60 (Tex.Crim.App. 1981), and *Howard v. State*, 599 S.W.2d 597, 602 (Tex.Crim.App. 1979). *See also* Apt's Reply Brief at 15.

<sup>8</sup> Notably, Mr. Thomas also cited and relied on cases of this type from both federal courts of appeals and other States. *See* Apt's Reply Brief at 16-17.

<sup>9</sup> *See Marcopoulos v. State*, 538 S.W.3d 596, 602 (Tex.Crim.App. 2017). As Mr. Thomas noted during oral argument, the First Court of Appeals reversed *Marcopoulos* on remand, and the State has sought discretionary review of that decision in this Court.